STATE OF MICHIGAN

IN THE SUPREME COURT

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff-Appellant,

SUPREME COURT
No.

vs.

COURT OF APPEALS
No. 327208

DEVAUN LAROY LOPEZ,
Defendant-Appellee.
_____/

CIRCUIT COURT
No. 14-040317-FC

PLAINTIFF-APPELLANT'S APPLICATION FOR LEAVE TO APPEAL

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STATEMENT OF JUDGMENT APPEALED FROM & RELIEF SOUGHT

The People seek leave to appeal the Michigan Court of Appeals' decision in *People v Lopez*, __ Mich App __; __ NW2d __ (2016) (Docket No. 327208), entered on August 18, 2016, and marked for publication. This application has been filed within 56 days of the Court of Appeals' opinion as required by MCR 7.302(B)(3). As discussed herein, and pursuant to MCR 7.305(B)(5)(a), the Court of Appeals decision constitutes clear error causing material injustice. Accordingly, the People ask this Honorable Court to grant its application to address (1) whether the Court of Appeals clearly erred when it ruled that the prosecutor's conduct and/or statements directed at witness Hoskins in the trial court constituted threats, intimidation, and/or misconduct; and (2) whether the Court of Appeals clearly erred when it found that the prosecutor's conduct and/or statements in the trial court compelled witness Hoskins' to invoke his Fifth Amendment rights thereby rendering him unavailable as a result of the prosecutor's actions, and ruling that on retrial if witness Hoskins maintains his silence, his preliminary examination testimony may not be presented to the jury. In the alternative, the People ask this Court to remand these proceedings to the trial court for an evidentiary hearing regarding this issue, or to reverse the Court of Appeals' decision in its entirety and reinstate Defendant's conviction and sentence.

STATEMENT OF QUESTIONS INVOLVED

I. DID THE COURT OF APPEALS CLEARLY ERR, CAUSING MATERIAL INJUSTICE, WHEN IT RULED THAT THE PROSECUTOR'S CONDUCT AND/OR STATEMENTS DIRECTED AT WITNESS HOSKINS IN THE TRIAL COURT CONSTITUTED THREATS, INTIMIDATION, AND/OR MISCONDUCT?

Plaintiff-Appellant says "YES".
Defendant-Appellee says "NO".
Court of Appeals says "NO".
Trial Court says "YES".

II. DID THE COURT OF APPEALS CLEARLY ERR, CAUSING MATERIAL INJUSTICE, WHEN IT FOUND THAT THE PROSECUTOR'S CONDUCT AND/OR STATEMENTS IN THE TRIAL COURT COMPELLED WITNESS HOSKINS' TO INVOKE HIS FIFTH AMENDMENT RIGHTS RENDERING HIM UNAVAILABLE AS A RESULT OF THE PROSECUTOR'S ACTIONS, AND RULING THAT ON RETRIAL IF WITNESS HOSKINS MAINTAINS HIS SILENCE HIS PRELIMINARY EXAMINATION TESTIMONY MAY NOT BE PRESENTED TO THE JURY?

Plaintiff-Appellant says "YES".
Defendant-Appellee says "NO".
Court of Appeals says "NO".
Trial Court says "YES".

KEY TO ABBREVIATIONS

The following abbreviations shall be used in this brief:

1. "PE" refers to the defendant-appellee's preliminary exam transcript, dated August 1, 2014.
2. "TT1" refers to Volume I of the trial transcripts dated March 11, 2015, and annexed hereto as Appendix B.
3. "TT3" refers to Volume III of the trial transcripts dated March 13, 2015, and annexed hereto as Appendix C.
4. "TT5" refers to Volume V of the trial transcripts, dated March 17, 2015, and annexed hereto as Appendix D.

STATEMENT OF FACTS

Defendant-appellee was charged with first degree premeditated murder, contrary to MCL 750.316(a); conspiracy to commit first degree premeditated murder, contrary to MCL 750.157a(1)(a) and MCL 750.316(a); one count of armed with intent to use dangerous or deadly weapon or instrument, contrary to MCL 750.226; one count of possession of firearm or ammunition by person convicted of felony, contrary to MCL 750.224f; and four counts of possession of firearm when committing or attempting to commit felony, contrary to MCL 750.227b. On August 1, 2014, the 70th District Court, Hon. Terry L. Clark presiding, bound over the defendant-appellee on the above charges subsequent to a preliminary examination. At the preliminary examination, the People elicited testimony from witness Dennis Hoskins. Witness Hoskins provided favorable testimony against the defendant-appellant and his co-defendant. At that time, the witness indicated that he was receiving no benefit on a pending assault with intent to murder charge in exchange for his favorable testimony. PE, p. 40. At that time, he indicated that he, "just felt that it was right." PE, p. 43.

Defendant-appellee's trial on the above charges began on March 11, 2015. Over the course of the trial, an issue arose regarding the availability of witness Hoskins' testimony. Specifically, the following exchange occurred:

> MR. TRICE: Your Honor, we did raise an issue in chambers with Your Honor. I don't know if you want us to address those issues now.
>
> THE COURT: Well, we might as well.
>
> MR. TRICE: Your Honor, it was brought up on yesterday, at least it was brought to my attention, that as Mr. Hoskins was leaving the courtroom and after we had the hearing on the motion to declare him unavailable, that he made comments to Mr. Lopez and Mr. Reed to the effect that, "I've got you covered, bro." And I – my interpretation of that is that he – he may intend to perjure himself during this trial, or give testimony that's inconsistent with his testimony at the preliminary examination.

Your Honor, I believe that – I do believe Mr. Dunn, his attorney, is going to be present for his testimony, but I believe under the case of *People vs. Daniels*, which is an unpublished cased from 1997, the court – the Court of Appeals indicated, so that there is no appearance of impropriety or any witness intimidation, the appropriate procedure in addressing that issue would be, outside of the presence of the jury, to inform Mr. Hoskins of his Fifth Amendment right if he does intend to give perjured testimony, to make sure he is aware of his rights, and then determine what if anything he decides to do at that point, All of that should be done outside of the presence of the jury.

I guess my second issue, Your Honor, which is in that same vein, is that in chambers, and throughout the afternoon yesterday, Mr. – Mr. Johnson accused the prosecution of threatening or intimidating Mr. Hoskins during our colloquy with him yesterday morning. At that time, Mr. Johnson, who was the first to speak to Mr. Hoskins, did indicate that the prosecution could threaten to charge you with perjury if you do say something that's inconsistent with what you said at the preliminary examination. I did follow that up with I'm not going to threaten you, but we will – we could possibly charge you with perjury if you do say something that's inconsistent with what you testified to at the preliminary examination.

Under *People vs. Daniels*, that very – that very case that I've cited to the Court, the court – the Court of Appeals indicated we believe that Ward, the witness in that case, was likewise properly informed that he could be subject to criminal prosecution for perjury if he had lied while under oath at the preliminary examination, and that such information does not rise to the level of intimidation. Which is exactly what I did. I informed him that he could be charged with perjury if he provided testimony that was inconsistent with his preliminary exam testimony. The Court of Appeals certainly supports, if I did in fact, I suppose, quote-unquote, threaten him, that the court says that's not a threat. That's just the reality. If you do provide perjured testimony, you could in fact be charged with perjury.

My concern is that Mr. Johnson is going to inflame the jury by asking Mr. Hoskins questions about, well, did you feel threatened? Did you feel intimidated? I don't think it's appropriate under this – in this case, the court said it's not prosecutorial misconduct for a prosecutor to in fact do that, and I think it would be an improper line of questioning.

THE COURT: All right.

MR. JOHNSON: May I respond, Your Honor?

THE COURT: Mm-hmm.

MR. JOHNSON: It's not just that the prosecutor, in my view, threatened the witness if he should happen to change his testimony from the preliminary exam and to trial. We don't know what's perjury and what's not. We don't know what he's going to say at trial at this point. And whether or not what he says at trial, if it's different from the preliminary exam, whether what he says at trial is perjured testimony or not is to be determined by the jury and not by this proctor, number one.

But he not only said you could be charged, but he also stated to the witness that if he were convicted, he would be facing life in prison, which is a

misstatement of the law. The statute clearly says, and deals with the life in prison question as it relates to testimony at or on trial. So if he gets on the witness stand and testifies as he did in the preliminary exam, and if that's perjured testimony, he'd be looking at a life sentence, but not if his testimony at the preliminary exam was perjured testimony. That's a misstatement of the law and it was used merely and purely to scare this witness.

MR. GUST: I just observed what happened, Your Honor, I didn't take part in the discussions. But Mr. Trice did in fact tell the witness that he would be looking at life. And the manner in which Mr. Trice spoke was not as he spoke here; it was more of a threatening, kind of an aggressive statement to this young man. It wasn't just, well, these are your rights, young man. You know, just the tone of his voice, it sounded like a threat to me.

MR. TRICE: Your Honor, may I respond, just to create a record, please?

THE COURT: All right.

MR. TRICE: And, Your Honor, Jessica Welton, Detective Welton was present yesterday during this discussion with Mr. Hoskins, and I would like for her to at least give her version of what happened and – I'm being accused of unethical conduct by Mr. Gust and Mr. – Mr. Johnson, I believe I should be allowed to create a record about what actually happened while we were in the room. So I would like Miss Welton, Detective Welton, to give the Court her version of what she heard in the – in the jury room.

THE COURT: All right.

DETECTIVE WELTON: I didn't hear any threats or anything. Mr. Johnson and Mr. Trice spoke to Mr. Hoskins just as they spoke to you, Your Honor. I didn't hear any threatening from either one of them.

THE COURT: All right.

MR. TRICE: And, Your Honor, under this case, I am allowed to – I'm allowed under 750.422, which is the statute that the Court of Appeals cites in this, that if he provided perjured testimony at a preliminary examination and then testifies at trial, that I have a right to inform him, if you do that, you can be charged with a life offense, and the court specifically quoted 750.422 which deals with life or any term of years.

THE COURT: All right. Well, as I indicated to counsel in chambers, none of you represent Mr. Hoskins and we have Mr. Dunn who represents Mr. Hoskins. Mr. Dunn was here yesterday, talked to Mr. Hoskins. I had Mr. Hoskins on the witness stand, as the record will reflect, asked him what he intended to do at trial, testify or not testify, *he said he's going to testify*. So at this juncture, until it's time to call Mr. Hoskins, we'll put this issue off to the side and we'll ask him once again outside the presence of the jury what his intention is, and after that we'll figure out what we want to do with Mr. Hoskins overall, whether it's charge, not charge, anything of that nature. [TT1, pp. 11-16 (emphasis added).]

Later in the proceedings, witness Hoskins apparently reconsidered and decided not to testify. As a result, the following exchange occurred:

THE COURT: So, Mr. Dunn, have you had the chance to discuss the fact that he's a subpoenaed witness in the case.

MR. DUNN: Yes – yes, we have, Judge.

THE COURT: And what's his pleasure with regard to testifying during this trial?

MR. DUNN: I believe at this point, after considering the matter again, he wishes to exercise his Constitutional right under the Fifth Amendment under the United States Constitution and refuses to answer questions which could subject him, possibly, to a charge of perjury if he were to answer them.

THE COURT: Mr. Hoskins, did you hear and understand what Mr. Dunn has stated to the Court?

THE WITNESS: Yes. The Prosecutor's told me -- they threatened me with life in prison.

THE COURT: Okay. With regard to your right to testify or not to testify, do you wish to exercise your Fifth Amendment privilege and not testify at this time?

THE WITNESS: Yes, sir. [TT3, p. 5-6.]

Shortly before the trial court instructed the jury, the defendant-appellant's co-defendant moved the court to strike witness Hoskins' preliminary exam testimony pursuant to MRE 804(a). The following exchange ensued:

MR. TRICE: Your Honor, on behalf of the People, I think it's important that we rectify Mr. Johnson's version of the facts in this case. It's my understanding that when we went back to talk to Mr. Hoskins, that Mr. Johnson was the one who, in fact, initially brought up the issue of being charged with perjury if he should decide to change his testimony. It was not brought up by the People.

The People were responding to what Mr. Johnson actually told Mr. Hoskins, which was, we are not threatening you but that you could be charged with perjury if you do lie under oath. That's what the People indicated to Mr. Hoskins at the time.

* * *

THE COURT: Well, this is all very interesting and we've made a clear record of your positions. I'm going to deny the motion itself.

The witness himself indicated *he felt* threatened; that's why he wasn't testifying. Mr. Dunn could say what he wanted to say, but I'm not going to take his testimony over the witness's testimony himself. [TT5, p. 6-8 (emphasis added).]

The trial court heard closing arguments on March 17, 2015. Later that day, after

approximately four-and-a-half hours of deliberation, the jury returned a verdict of guilty on all counts. On April 20, 2015, the trial court sentenced defendant-appellee to life on the first degree premeditated murder count; life on the conspiracy to commit first degree premeditated murder count; 76-180 months on the armed with intent to use dangerous or deadly weapon or instrument count; 76-180 months on the possession of firearm or ammunition by person convicted of felony count; and 24 months on each of the four possession of firearm when committing or attempting to commit felony counts.

Defendant-appellee filed his claim of appeal with the Michigan Court of Appeals on May 5, 2015. His brief on appeal with the court was filed on October 8, 2015. The People filed their brief in response on December 12, 2015. The Court of Appeals heard oral argument and submitted the case on case call on July 12, 2016. On August 18, the Michigan Court of Appeals issued its opinion, *People v Devaun Laroy Lopez*, ___ Mich App ___; ___ NW2d ___ (2016) (Docket No. 327208), vacating the conviction of the defendant-appellant. Holding that a new trial was warranted because the trial court judge found that the witness invoked the Fifth Amendment because he *felt* threatened, the *Lopez* panel found that the prosecutor did actually threaten and intimidate witness Dennis Hoskins with the specter of a lifetime of incarceration if he provided untruthful testimony. Therefore, the panel reasoned, the prosecutor's actions compelled Hoskins to invoke his Fifth Amendment right against self-incrimination and made him unavailable to testify. Specifically, the *Lopez* panel found that, "[t]he prosecutor's statements exceeded mere advisement, and crossed into the realm of threat and intimidation." *Lopez*, __Mich App at __; slip op at 9. Based on the panel's analysis, the prosecutor made the witness unavailable thereby rendering the transcript of his preliminary exam testimony inadmissible pursuant to MRE 804(a).

This Application for Leave to Appeal follows.

ARGUMENT I

THE COURT OF APPEALS CLEARLY ERRED, CAUSING MATERIAL INJUSTICE, WHEN IT RULED THAT THE PROSECUTOR'S CONDUCT AND/OR STATEMENTS DIRECTED AT WITNESS HOSKINS IN THE TRIAL COURT CONSTITUTED THREATS, INTIMIDATION, AND/OR MISCONDUCT.

A. STANDARD OF REVIEW

"The appropriate standard of harmless error review depends on whether the error is constitutional or nonconstitutional in nature, and whether the appellant preserved the issue." *People v Whittaker*, 465 Mich 422, 426; 635 NW2d 687 (2001), citing *People v Carines*, 460 Mich 750, 774; 597 NW2d 130 (1999). In the case at bat, the Court of Appeals determined that evidence was erroneously admitted. This is a nonconstitutional error, to which the defendant objected to the admission of the evidence at trial. "Thus, the standard is that for preserved nonconstitutional errors. The standard is derived from M.C.L. § 769.26." *Whittaker*, 465 Mich at 426. MCL 769.26 provides, in relevant part, that:

> [n]o judgment or verdict shall be . . . reversed . . . in any criminal case, on the ground of . . . the improper admission . . . of evidence . . . unless in the opinion of the court, after an examination of the entire cause, it shall affirmatively appear that the error complained of has resulted in a miscarriage of justice. [MCL 769.26.]

In *People v Lukity*, 460 Mich 484, 496; 596 NW2d 607 (1999), this court stated that MCL 769.26:

> with its rebuttable presumption, clearly places the burden on the defendant to demonstrate that a preserved, nonconstitutional error resulted in a miscarriage of justice.
>
> * * *
>
> Therefore, the bottom line is that § 26 presumes that a preserved, nonconstitutional error is not a ground for reversal unless after an examination of

> the entire cause, it shall affirmatively appear that it is more probable than not that the error was outcome determinative. [*Lukity*, 460 Mich at 493–496 (internal quotations omitted).]

An error is deemed to have been "outcome determinative" if it undermined the reliability of the verdict. See *People v. Snyder*, 462 Mich. 38, 45, 609 N.W.2d 831 (2000), citing *Lukity*, supra at 495–496, 596 N.W.2d 607.

B. LEGAL STANDARDS

Without a violation of a specific constitutional right, for prosecutorial misconduct to constitute constitutional error, "the misconduct must have so infected the trial with unfairness as to make the conviction a deprivation of liberty without due process of law." *Id.* at 262, citing *Donnelly v DeChristoforo*, 416 US 637, 643; 94 S Ct 1868; 40 L Ed2d 431 (1974). "[A] defendant has the burden of establishing that it is more probable than not that the error in question 'undermine[d] the reliability of the verdict,' thereby making the error 'outcome determinative.'" *Id.* at 270, quoting *People v Lukity*, 460 Mich 484, 495-496; 596 NW2d 607 (1999). Ultimately, "[t]he record must be read as a whole . . . and the allegedly impermissible statements judged in the context in which they are made. *People v Reed*, 449 Mich 375, 398–99; 535 NW2d 496, 508 (1995), citing *People v. Duncan,* 402 Mich 1, 15-16, 260 NW2d 58 (1977). In making this determination, the reviewing court should focus on the nature of the error in light of the weight and strength of the untainted evidence. See *Lukity*, 460 Mich at 495. See also *People v Mateo*, 453 Mich 203, 215; 551 NW2d 891 (1996).

C. DISCUSSION

The Michigan Court of Appeals recently issued *People v Devaun Laroy Lopez*, ___ Mich

App ___; ___ NW2d ___ (2016) (Docket No. 327208), vacating the conviction of the defendant-appellant. Specifically, the *Lopez* panel held that the prosecutor threatened and intimidated witness Dennis Hoskins, thereby inducing him to invoke his Fifth Amendment right against self-incrimination and making him unavailable to testify. The *Lopez* panel found that because the prosecution's actions rendered the witness unavailable, the transcript of his preliminary exam testimony was not admissible pursuant to MRE 804(a). In reaching its conclusion that the prosecutor threatened and intimidated Hoskins, the *Lopez* panel invoked the procedure set forth in *People v Callington*, 123 Mich App 301, 307; 333 NW2d 260 (1983). Specifically, the court stated that it is better practice to tell the trial court of the possibility that a witness may need to be informed of their Fifth Amendment rights, and it is the court's discretion whether such warnings will be issued. The lower court record reflects that this is exactly what the prosecutor requested the trial court to do when the issue was raised on the first day of trial.

Initially, it is the People's position that the Court of Appeals determination that the prosecutor committed misconduct is clearly erroneous. Recently, the Michigan Court of Appeals ruled that:

> it is a misnomer to label claims such as this one as "prosecutorial misconduct." This concern for the proper phrase is not a case of mere political correctness, for the term misconduct has a specific legal meaning and connotation when it comes to attorney conduct, and is in general limited to instances of illegal conduct, fraud, misrepresentation, or violation of the rules of professional misconduct. See MRPC 8.4 and *Grievance Administrator v. Deutch,* 455 Mich. 149, 164; 565 NW2d 369 (1997). Although we recognize that the phrase prosecutorial misconduct has become a term of art in criminal appeals, we agree that *the term "misconduct" is more appropriately applied to those extreme—and thankfully rare—instances where a prosecutor's conduct violates the rules of professional conduct or constitutes illegal conduct.* See, e.g., MRPC 8.4. In the vast majority of cases, the conduct about which a defendant complains is premised on the contention that the prosecutor made a technical or inadvertent error at trial—which is not the kind of conduct that would warrant discipline under our code of professional conduct. Therefore, we agree that these claims of error might be better and more fairly presented as claims of "prosecutorial error," with only the

> most extreme cases rising to the level of "prosecutorial misconduct." [*People v Cooper*, 309 Mich App 74, 87–88; 867 NW2d 452, app den 498 Mich 896; 870 NW2d 67 (2015) (emphasis added).]

As this Court is aware, MCR 7.215 provides that, "[a] published opinion of the Court of Appeals has precedential effect under the rule of stare decisis." MCR 7.215(C)(2). Therefore, the *Lopez* panel was obligated to follow the *Cooper* decision when issuing its opinion. The Plain language of the *Cooper* decision specifies that, "the term 'misconduct' is more appropriately applied to those extreme—and thankfully rare—instances where a prosecutor's conduct violates the rules of professional conduct or constitutes illegal conduct." *Cooper*, 309 Mich App at 87–88, citing MRPC 8.4. Despite this requirement, the Lopez panel ruled that, "The prosecutor's statements exceeded mere advisement, and crossed into the realm of threat and intimidation." *Lopez*, __Mich App at__; slip op at 9.

MRPC 8.4 provides, in relevant part, that:

> It is professional misconduct for a lawyer to:
> (a) violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another;
> (b) engage in conduct involving dishonesty, fraud, deceit, misrepresentation, *or violation of the criminal law*, where such conduct reflects adversely on the lawyer's honesty, trustworthiness, or fitness as a lawyer;
> (c) *engage in conduct that is prejudicial to the administration of justice*;
> (d) state or imply an ability to influence improperly a government agency or official; or
> (e) knowingly assist a judge or judicial officer in conduct that is a violation of the Code of Judicial Conduct or other law. [MRPC 8.4 (emphasis added).]

The Court will note that the *Lopez* panel interpreted the prosecutor's statements as threats and intimidation. Arguably, if true, these actions may constitute violations of paragraphs (b) and (c) above. The *Lopez* panel did so without ever accusing the prosecutor of a violation of the rules of ethics, specifically MRPC 8.4. Because the *Cooper* decision indicates that such a finding is required for prosecutorial misconduct to exist, and the *Lopez* panel made no such finding, it is

the People's position that no misconduct occurred. Further, should this Court consider the comments in question in the context of prosecutorial error it is the People's position that they do not meet that threshold either.

MCL 750.122, entitled "Inducements or promises to witnesses, prohibitions; threats or intimidation," provides in part that:

> (1) A person shall not give, offer to give, or promise anything of value to an individual for any of the following purposes:
> (a) To discourage any individual from attending a present or future official proceeding as a witness, testifying at a present or future official proceeding, or giving information at a present or future official proceeding.
> (b) To influence any individual's testimony at a present or future official proceeding.
> (c) To encourage any individual to avoid legal process, to withhold testimony, or to testify falsely in a present or future official proceeding.
>
> * * *
>
> (3) A person shall not do any of the following by threat or intimidation:
> (a) Discourage or attempt to discourage any individual from attending a present or future official proceeding as a witness, testifying at a present or future official proceeding, or giving information at a present or future official proceeding.
> (b) Influence or attempt to influence testimony at a present or future official proceeding.
> (c) Encourage or attempt to encourage any individual to avoid legal process, to withhold testimony, or to testify falsely in a present or future official proceeding.
>
> * * *
>
> (5) Subsections (1) and (3) do not apply to any of the following:
> (a) *The lawful conduct of an attorney in the performance of his or her duties*, such as advising a client.
> (b) The lawful conduct or communications of a person as permitted by statute or other lawful privilege.
> (6) A person shall not willfully impede, interfere with, prevent, or obstruct or attempt to willfully impede, interfere with, prevent, or obstruct the ability of a witness to attend, testify, or provide information in or for a present or future official proceeding.
> (7) A person who violates this section is guilty of a crime as follows:
> (a) Except as provided in subdivisions (b) and (c), the person is guilty of a felony punishable by imprisonment for not more than 4 years or a fine of not more than $5,000.00, or both.

> (b) If the violation is committed in a criminal case for which the maximum term of imprisonment for the violation is more than 10 years, or the violation is punishable by imprisonment for life or any term of years, the person is guilty of a felony punishable by imprisonment for not more than 10 years or a fine of not more than $20,000.00, or both.
>
> * * *
>
> (12) As used in this section:
> (a) "Official proceeding" means a proceeding heard before a legislative, judicial, administrative, or other governmental agency or official authorized to hear evidence under oath, including a referee, prosecuting attorney, hearing examiner, commissioner, notary, or other person taking testimony or deposition in that proceeding. [MCL 750.122.]

Again, MCR 7.215 provides that, "[a] published opinion of the Court of Appeals has precedential effect under the rule of stare decisis." MCR 7.215(C)(2). Therefore, the *Lopez* panel was obligated to follow the *Cooper* decision when issuing its opinion. The Plain language of the *Cooper* decision specifies that, "the term 'misconduct' is more appropriately applied to those extreme—and thankfully rare—instances where a prosecutor's conduct violates the rules of professional conduct or constitutes illegal conduct." *Cooper*, 309 Mich App at 87–88, citing MRPC 8.4. Despite this requirement, the Lopez panel ruled that, "[t]he prosecutor's statements exceeded mere advisement, and crossed into the realm of threat and intimidation." *Lopez*, __Mich App at __; slip op at 9. The Court will note that the *Lopez* panel did so without ever accusing the prosecutor of committing a crime, specifically witness intimidation. In fact, when the elemental requirements of witness intimidation are applied to the alleged actions of the prosecutor, they do not arise to the level of criminal activity. Because the *Cooper* decision indicates that such a finding is required for prosecutorial misconduct to exist, and the *Lopez* panel made no such finding, it is the People's position that no misconduct occurred. Further, should this Court consider the comments in question in the context of prosecutorial error it is the People's position that they do not meet that threshold either.

The Court will note that, as of the date of this Application, no one associated with this case has filed any grievance with the State Bar concerning the *Lopez* panel's accusations of the prosecutor threatening or intimidating witness Hoskins. Further, to the best of the People's knowledge, no crime has been reported, investigated, charged, nor warrant issued by any law enforcement agency, state or federal, in Michigan regarding the conduct in question. In fact, subsequent to defendant-appellant's trial, the prosecutor took employment at the United States Attorney's office. Further, on July 13, 2016, the prosecutor in question was appointed to serve as a judge of the 70th District Court in Saginaw County.[1] The *Lopez* panel issued their opinion on August 18, 2016. It is the People's understanding that, as of the date of this Application, no complaint has been filed with the Judicial Tenure Commission regarding this case.

The *Lopez* panel's suggestion that "[t]he prosecutor's statements exceeded mere advisement, and crossed into the realm of threat and intimidation," constitutes conduct so flagrant it justifies the vacation of a valid conviction rendered by a jury, but does not arise to the level of conduct that would trigger ethical or criminal complaints is inexplicable. Therefore, one could reasonably reach the conclusion that the prosecutor's conduct was not nearly as egregious as the *Lopez* opinion alleges, and does not constitute prosecutorial misconduct or error.

D. CONCLUSION

The *Lopez* panel interpreted the prosecutor's statements as threats and intimidation. It did so without ever accusing the prosecutor of a violation of the rules of ethics, specifically MRPC 8.4, or of committing a crime, specifically witness intimidation. In fact, when the elemental requirements of witness intimidation are applied to the alleged actions of the prosecutor, they do not arise to the level of criminal activity. Because the *Cooper* decision

[1] http://www.michigan.gov/snyder/0,4668,7-277-57577_57657_59871-388555--,00.html

indicates that such findings are required for prosecutorial misconduct to exist, and the *Lopez* panel made no such findings, it is the People's position that no misconduct occurred. Further, should this Court consider the comments in question in the context of prosecutorial error it is the People's position that they do not meet that threshold. However, should this court determine that the lower court should develop the record further and make a ruling on this issue, remand for an evidentiary hearing may be necessary to more adequately address this issue.

ARGUMENT II

THE COURT OF APPEALS CLEARLY ERRED, CAUSING MATERIAL INJUSTICE, WHEN IT FOUND THAT THE PROSECUTOR'S CONDUCT AND/OR STATEMENTS IN THE TRIAL COURT COMPELLED WITNESS HOSKINS' TO INVOKE HIS FIFTH AMENDMENT RIGHTS RENDERING HIM UNAVAILABLE AS A RESULT OF THE PROSECUTOR'S ACTIONS, AND RULING THAT ON RETRIAL IF WITNESS HOSKINS MAINTAINS HIS SILENCE HIS PRELIMINARY EXAMINATION TESTIMONY MAY NOT BE PRESENTED TO THE JURY.

A. STANDARD OF REVIEW

"A trial court's discretionary decisions concerning whether to admit or exclude evidence 'will not be disturbed absent an abuse of that discretion.'" *People v Mardlin*, 487 Mich 609, 614; 790 NW2d 607 (2010), quoting *People v McDaniel,* 469 Mich 409, 412; 670 NW2d 659 (2003). "A trial court abuses its discretion when it chooses an outcome falling outside the range of principled outcomes." *People v Watkins*, 491 Mich 450, 467; 818 NW2d 296 (2012), citing *People v Babcock,* 469 Mich 247, 269; 666 NW2d 231 (2003). "When the decision involves a preliminary question of law however, such as whether a rule of evidence precludes admission, we review the question de novo." *Mardlin*, 487 Mich at 614, citing *McDaniel,* 469 Mich at 412. Whether a defendant was denied his constitutional right to confrontation is reviewed *de novo*. *People v Breeding*, 284 Mich App 471, 479; 772 NW2d 810 (2009).

B. LEGAL STANDARDS

Regarding inadmissible hearsay statements, the Michigan Rules of Evidence provide that:

> (a) Statement. A "statement" is (1) an oral or written assertion or (2) nonverbal conduct of a person, if it is intended by the person as an assertion.
> (b) Declarant. A "declarant" is a person who makes a statement.

> (c) Hearsay. "Hearsay" is a statement, other than the one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted. [MRE 801(a), (b), & (c).]

MRE 802 states that, "[h]earsay is not admissible except as provided by these rules." MRE 802. MRE 804 provides for exceptions to MRE 801 and MRE 802. However, the exceptions enumerated in MRE 804 can only be applied in circumstances where the declarant is unavailable. Accordingly, MRE 804 provides, in relevant part, that:

> (a) Definition of Unavailability. "Unavailability as a witness" includes situations in which the declarant--
> (1) is exempted by ruling of the court on the ground of privilege from testifying concerning the subject matter of the declarant's statement; or
> (2) persists in refusing to testify concerning the subject matter of the declarant's statement despite an order of the court to do so; or
> (3) has a lack of memory of the subject matter of the declarant's statement; or
> (4) is unable to be present or to testify at the hearing because of death or then existing physical or mental illness or infirmity; or
> (5) is absent from the hearing and the proponent of a statement has been unable to procure the declarant's attendance (or in the case of a hearsay exception under subdivision (b)(2), (3), or (4), the declarant's attendance or testimony) by process or other reasonable means, and in a criminal case, due diligence is shown.
>
> A declarant is not unavailable as a witness if exemption, refusal, claim of lack of memory, inability, or absence is due to the procurement or wrongdoing of the proponent of a statement for the purpose of preventing the witness from attending or testifying.
>
> (b) Hearsay Exceptions. The following are not excluded by the hearsay rule if the declarant is unavailable as a witness:
>
> (1) *Former Testimony.* Testimony given as a witness at another hearing of the same or a different proceeding, if the party against whom the testimony is now offered, or, in a civil action or proceeding, a predecessor in interest, had an opportunity and similar motive to develop the testimony by direct, cross, or redirect examination. [MRE 804 (a) & (b)(1).]

"In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him . . . ." US Const, Am VI; see also Const 1963, art 1, § 20. The Confrontation Clause normally bars the admission of a witness's testimonial statements if the

witness does not appear at trial unless the defendant had a prior opportunity to cross-examine the witness. *Crawford v Washington*, 541 US 36, 59; 124 S Ct 1354; 158 L Ed2d 177 (2004). Likewise, this Court has recognized that a trial court may admit former testimony "at trial under both MRE 804(b)(1) and the Confrontation Clause as long as the witness is unavailable for trial and was subject to cross-examination during the prior testimony." *People v Garland*, 286 Mich App 1, 7; 777 NW2d 732 (2009), citing *Crawford*, 541 US 36. A witness is considered "unavailable" when he asserts his Fifth Amendment right to silence at trial. *People v Meredith*, 459 Mich 62, 65-66; 586 NW2d 538 (1998).

C. DISCUSSION

Relying on *People v Pena*, 383 Mich 402; 175 NW2d 767 (1970), and *People v McIntosh*,142 Mich App 314; 370 NW2d 337 (1985) the *Lopez* panel erroneously determined that the prosecutor threated and intimidated witness Hoskins. Further the *Lopez* panel determined that this alleged conduct procured the unavailability of the witness. Therefore, the *Lopez* panel reasoned that witness Hoskins' prior recorded preliminary exam testimony was not admissible due to the prosecution being the proponent of the statement. The *Lopez* panel then went one step further, and ruled that the testimony was forever inadmissible should witness Hoskins elect not to testify. Notably, however, the *Lopez* panel seemed to leave an unstated exception for impeachment purposes.

Unlike the decisions and remedies espoused in *Pena* and *McIntosh*, the *Lopez* panel deviated from an essential element of those opinions. In *Pena* and *McIntosh*, this Court and the Michigan Supreme Court ruled that because possible prosecutorial intimidation was present, whether intended or not, there must be an evidentiary hearing to determine if the witness was

actually intimidated. The record reflects that Mr. Hoskins stated he *felt* threatened, not that he actually was. Further, there was no determination made by the trial court that he actually was. The People believe that the *Lopez* panel erred when it diverged from established precedent by not remanding this case for an evidentiary hearing to determine what was actually said and if the witness was actually threatened. Specifically, the trial court found that, "Well, this is all very interesting and we've made a clear record of your positions. I'm going to deny the motion itself. The witness himself indicated he *felt* threatened; that's why he wasn't testifying." TT5, p. 8 (emphasis added). When this Court focuses its attention on the pertinent part of the record, it becomes apparent that the trial court did not actually find that the prosecutor threatened the witness.

The decision in *Lopez* focuses on Dennis Hoskins' feelings, specifically how Hoskins felt when he was informed of the potential penalty for perjury. See *Lopez,* __Mich App at __; slip op at 9-10. As this Court can appreciate, feelings are inherently subjective. The trial court never made any objective determination regarding the prosecutor's comments or their impact. Given the fact that there was testimony from Mr. Hoskins attorney that some other issues may have factored in Mr. Hoskins decision, it is hard to say for certain that Mr. Hoskins was actually threatened by the prosecutor. Therefore, the People believe that at the very least an evidentiary hearing on whether Mr. Hoskins was actually threatened should have been ordered. This is essential, especially in light of the possible impact that the *Lopez* opinion could have on the application and availability of the hearsay exceptions provided for by MRE 804(b)(1)

MRE 804(a) provides that, "[a] declarant is not unavailable as a witness if exemption, refusal, claim of lack of memory, inability, or absence is due to the procurement or wrongdoing

of the proponent of a statement for the purpose of preventing the witness from attending or testifying." The rule goes on to provide that:

> [t]estimony given as a witness at another hearing of the same or a different proceeding, if the party against whom the testimony is now offered, or, in a civil action or proceeding, a predecessor in interest, had an opportunity and similar motive to develop the testimony by direct, cross, or redirect examination. [MRE 804 (b)(1).]

If, as the *Lopez* panel suggests, the nature and extent of a witnesses' availability can be determined merely by a subjectively stated opinion on the status of his feelings without objective confirmation, then the former testimony exception provided by MRE 804(b)(1) is effectively nonexistent. It is the People's position that the *Lopez* opinion dismisses the objective reasonability standard, one of the bedrock principles of our jurisprudence system, and replaces it with a paradigm that, henceforth, will allow a witness to "plead the fifth" when called to the stand to testify regarding prior preliminary exam testimony solely based on the witnesses' subjective feelings. All sworn testimony is given subject to perjury. Simply by virtue of it being a crime, perjury is inherently a charging option possessed by every prosecutor in this state. Therefore, the specter of perjury looms over all sworn testimony.

It is well settled that a prosecutor may inform a witness that false testimony could result in a perjury charge. See *People v Morrow*, 214 Mich App 158, 165, n. 5; 542 NW2d 324 (1995) (prosecutor properly informed recanting witness that failure to testify truthfully would subject her to criminal prosecution for perjury); *People v Robbins*, 131 Mich App 429, 439; 346 NW2d 333 (1984) (warnings to potential defense witness concerning possible perjury charges have been held to be proper). See also *Hence v Smith*, 49 F Supp 2d 547, 552 (ED Mich., 1999), quoting *United States v Whittington*, 783 F 2d 1210, 1219 (CA 5, 1986) ("a prosecutor does not attempt to intimidate a defense witness by warning him or her . . . of the consequences of testifying,

where the prosecutor simply tells a witness that if he or she testifies falsely, such testimony would support a perjury indictment"). In fact, the *Lopez* panel concedes that, "a prosecutor may inform a witness that false testimony may result in a perjury charge . . .." *Lopez*, __Mich App at __; slip op at 9. If the subjective, feelings-based model embodied by the *Lopez* panel is allowed to stand, then any time a prosecutor properly gives a warning that false testimony could result in a perjury charge a witness would need only to invoke the Fifth Amendment and state that they *feel* threatened by the prosecutor to effectively exclude their prior testimony. Logically, this new loophole could also be exploited in civil matters by both the plaintiff and the defendant. Without and objective test for *actual* threat, intimidation, or other wrongdoing on the part of the proponent of the statement, the hearsay exception provided by MRE 804(b)(1) effectively becomes unattainable inasmuch as its routine evasion becomes a plausible reality.

Further, this Honorable Panel must reject the *Lopez* analysis as it does not provide an adequate remedy. Fundamentally, it confuses informing a witness of the consequences of perjury with informing a witness of their rights under the Fifth Amendment. Specifically, the *Lopez* panel states that:

> Moreover, this Court has emphasized that when a prosecutor suspects that a witness may perjure himself,
>
> it is a better practice for the prosecutor to inform the court, in the appropriate case, out of the presence of the witness, of the possible need for a witness to be informed of his or her rights under the Fifth Amendment. The prosecutor should further state the basis for such request and the trial judge shall exercise his discretion in determining whether such warnings should issue. If the trial judge determines that such warnings are appropriate under the facts presented then the court shall inform the witness of his rights under the Fifth Amendment on the record out of the presence of the jury, if that be the case. [People v Callington, 123 Mich App 301, 307; 333 NW2d 260 (1983).]
>
> Because Hoskins was represented by counsel, the prosecutor was under no obligation to warn Hoskins of a risk of committing perjury. [*Lopez*, __Mich App at __; slop op at 9.]

Any witness may feel threatened or unnerved by the consequences of providing untruthful testimony. This is true no matter who actually informs the witness of potential consequences. For example, if the court were to inform a witness of the consequences of perjury, the witness may feel threatened by the court and decide not to testify. However, this is not the remedy that the *Lopez* panel suggests inasmuch as informing a witness of the penalty for the crime of perjury is not synonymous with the trial court informing a witness of their rights under the Fifth Amendment. Perjury occurs when a witness provides testimony that is false. Conversely, invoking the Fifth Amendment is to refrain from testifying at all.

Further, it is axiomatic that evocation of feelings can occur if defense counsel were to explain the possible consequences of perjury to a witness. Essentially, when using a subjective, feelings-based analysis it does not matter who explains potential penalties and consequences of perjury to the witness because they may subjectively feel intimated or threatened by the court, prosecutor, or defense counsel due solely to the prospective penalties. That is the difficulty when basing a legal ruling on a person's feelings. Feelings are emotions: they are unique, subjective, and not quantifiable.

As noted above, the trial court did not make a judicial determination regarding weather or not the witness was actually threatened. Nor did the lower court find as a matter of law that any alleged threat compelled he witness to invoke the Fifth Amendment. In fact, the lower court record indicates that the trial court did the opposite. Specifically, the lower court reflects the following:

> THE COURT: So, Mr. Dunn, have you had the chance to discuss the fact that he's a subpoenaed witness in the case.
> MR. DUNN: Yes – yes, we have, Judge.
> THE COURT: And what's his pleasure with regard to testifying during this trial?
> MR. DUNN: I believe at this point, after considering the matter again, he wishes to exercise his Constitutional right under the Fifth Amendment under the United

States Constitution and refuses to answer questions which could subject him, possibly, to a charge of perjury if he were to answer them.
THE COURT: Mr. Hoskins, did you hear and understand what Mr. Dunn has stated to the Court?
THE WITNESS: Yes. The Prosecutor's told me -- they threatened me with life in prison.
THE COURT: Okay. With regard to your right to testify or not to testify, do you wish to exercise your Fifth Amendment privilege and not testify at this time?
THE WITNESS: Yes, sir. [TT3, p. 5-6.]

Later in the trial, the defendant-appellant moved the court to strike witness Hoskins' preliminary exam testimony pursuant to MRE 804(a). The following exchange ensued:

MR. TRICE: Your Honor, on behalf of the People, I think it's important that we rectify Mr. Johnson's version of the facts in this case. It's my understanding that when we went back to talk to Mr. Hoskins, that Mr. Johnson was the one who, in fact, initially brought up the issue of being charged with perjury if he should decide to change his testimony. It was not brought up by the People.

The People were responding to what Mr. Johnson actually told Mr. Hoskins, which was, we are not threatening you but that you could be charged with perjury if you do lie under oath. That's what the People indicated to Mr. Hoskins at the time.

* * *

THE COURT: Well, this is all very interesting and we've made a clear record of your positions. I'm going to deny the motion itself.

The witness himself indicated he *felt* threatened; that's why he wasn't testifying. Mr. Dunn could say what he wanted to say, but I'm not going to take his testimony over the witness's testimony himself. [TT5, p. 8 (emphasis added).]

Based on the above portion of the lower court record, the prosecutor's comments were in response to statements originally made by counsel for the co-defendant, Mr. Johnson. The record also reflects that, before the trial began, Mr. Johnson made statements to witness Hoskins that the prosecutor would threaten him with possible perjury penalties. Mr. Johnson made these statements because he believed Mr. Hoskins had perjured himself at the preliminary examination. TT1, pp. 11-12. The prosecutor was only clarifying what co-defendant's attorney Mr. Johnson stated to Mr. Hoskins, and defending himself from baseless accusations of unethical

behavior. The *Lopez* panel apparently overlooked this, as it was not addressed in their opinion. It is the People's position that the prosecutor was clarifying defense counsel's statements and defending his credibility. Frankly, it is uncertain how the statements made by Mr. Johnson affected witness Hoskins. Therefore, an evidentiary hearing on this matter may be necessary to determine the nature and effect that these statements had on Mr. Hoskins.

Further, as the preceding indicates, the trial judge simply asked witness Hoskins if he intended to testify or not. The witness elected not to testify, claiming that he was threatened with life in prison. In denying the defendant-appellant's motion, the trial judge made no factual findings. Instead, the trial judge merely reiterated how Hoskins felt about the situation and how his feelings affected his decision. The *Lopez* panel used this declaration as justification for their conclusion that the trial judge found as a matter of law that the witness was threatened. This analysis not only misconstrues the record, but it erroneously relies on the subjective feelings of witness Hoskins instead of objective reasonability. Further, the *Lopez* panel overlooks the above cited portion of the record which appears to indicate that it was defense counsel that first planted the seed of perjury and threats, not the People.

Finally, the *Lopez* Panel held that, on retrial, if Dennis Hoskins maintains his silence his preliminary testimony will not be allowed to be presented to the jury. On its face, it is apparent that the *Lopez* panel has made an evidentiary ruling in a case that has not been issued. Further, *Lopez* panel made an evidentiary ruling on the admission of evidence that has yet to be presented, and has denied a motion for admission that has not been made. Drawing upon one of the most elemental legal tenants, this issue is not ripe for consideration by the Court of Appeals.

The nature of the Court of Appeals' remedy here is interesting inasmuch as it merely gives a blanket *ad infinitum* prohibition on the use of witness Hoskins' preliminary exam

testimony should he elect not to testify. This Court will note that the *Lopez* Panel gives no justification for this, legal or otherwise. This measure can be interpreted as pejoratively preventative; one attempting to alleviate the panel's perception of repugnant and permanent taint. However, as previously discussed, no taint exists. The *Lopez* Panel does not seem to think that the suspected evidentiary contamination stemming from the prosecutor's alleged actions could possibly be remedied. For example, if the testimony was so thoroughly spoiled by the lower court proceedings and the trial judge's apparent error, the panel could have remanded this case for retrial before a different judge. While this is arguably a misconstrual of the record, the *Lopez* panel stated that, "[t]he trial court recognized that Hoskins refused to testify due to the prosecutor's threat, yet failed to connect its finding with the rule's command that "procurement" of a witness's absence nullifies the witness's unavailability." *Lopez*, __Mich App at __; slip op at 11. When determining whether a case should be assigned to a different judge, this Court considers the following:

> (1) whether the original judge would reasonably be expected upon remand to have substantial difficulty in putting out of his or her mind previously-expressed views or findings determined to be erroneous or based on evidence that must be rejected, (2) whether reassignment is advisable to preserve the appearance of justice, and (3) whether reassignment would entail waste and duplication out of proportion to any gain in preserving the appearance of fairness. [People v Hill, 221 Mich App 391, 398; 561 NW2d 862 (1997).]

Because the panel did not order that this case be assigned to a different judge, one can safely infer that the *Lopez* Panel found that there was no substantial concern that these factors would create an issue on retrial. The *Lopez* panel presumptively found that no fundamental violations of the constitutional rights of the witness or the defendant were committed by the trial court. Because the *Lopez* Panel did not find the witness's attorney or the defendant-appellant's

trial counsel constitutionally ineffective, the only other party that could continue the perpetuation of the testimonial taint is the prosecution.

The Court will note that the Lopez Panel did not remand with instructions or recommendations that this case be retried by anyone other than the Saginaw County Prosecutor's Office. While the Panel could have conceivably recommended that the matter be assigned to a special prosecutor, or even to the Attorney General's Office, it did not. Apparently, the panel did not think that the cause of the evidentiary taint had infected the entire prosecutor's office. The *Lopez* panel did not even go as far as to remand for a new trial with instructions that a different prosecutor be assigned to the case. As noted above, the prosecutor in question is now a district court judge. Accordingly, there is a great degree of attenuation between the underlying incident, a future trial, and the alleged impetus of evidentiary spoliation regarding the witness's preliminary exam testimony. Therefore, if there are no renewed threats or acts of intimidation, and the witness is advised of his Fifth Amendment rights by the trial court in the manner described by the *Lopez* panel, there is no constitutional or evidentiary defect in allowing witness Hoskins' preliminary exam testimony to be read to the jury should he decide to invoke the Fifth Amendment, chose not to testify, and render himself unavailable.

At any subsequent trial, Mr. Hoskins may choose to testify or may invoke his Fifth Amendment rights and not testify. Further, it is entirely possible that, he may not feel threatened during the retrial. There are countless factors the future may hold, none of which are currently known. As this Court is aware, a ruling on the evidentiary value and admissibility requires foundational testimony and a motion for admission; however, no said testimony or motion was even remotely in the preview of the *Lopez* panel.

D. CONCLUSION

The decision in *Lopez* focuses on Dennis Hoskins' feelings, specifically how Hoskins felt when he was informed of the potential penalty for perjury. See *Lopez,* __Mich App at __; slip op at 9-10. As this Court can appreciate, feelings are inherently subjective. The trial court never made any objective determination regarding the prosecutor's comments or their impact. Given the fact that there was testimony from Mr. Hoskins attorney that some other issues may have factored in Mr. Hoskins decision, it is hard to say for certain that Mr. Hoskins was actually threatened by the prosecutor. Therefore, the People believe that at the very least an evidentiary hearing on whether Mr. Hoskins was actually threatened should have been ordered. This is essential, especially in light of the possible impact that the *Lopez* opinion could have on the application and availability of the hearsay exceptions provided for by MRE 804(b)(1). Further, as discussed above, if there are no renewed threats or acts of intimidation, and the witness is advised of his Fifth Amendment rights by the trial court in the manner described by the *Lopez* panel, there is no constitutional or evidentiary defect in allowing witness Hoskins' preliminary exam testimony to be read to the jury should he decide to invoke the Fifth Amendment, chose not to testify, and render himself unavailable.

SUMMARY AND RELIEF SOUGHT

WHEREFORE, the People respectfully request that this Honorable Court grant its application for leave to appeal the judgment of the Court of Appeals or, in the alternative, reverse the Court of Appeals' decision in its entirety and reinstate Defendant's conviction and sentence.

Respectfully submitted,

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Dated: October 13, 2016

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